The State Government of Sabah & Ors v Clarence Chiuh Ken Loong & Ors

COURT OF APPEAL (PUTRAJAYA) — APPEAL NO S-01–404–10 OF 2014
ROHANA YUSUF, IDRUS HARUN AND ZAMANI A RAHIM JJCA
14 DECEMBER 2016

Land law — Alienation of land — Legitimate expectation — Offer letters to alienate land — Whether conditional offer — Whether land title could only be issued after proper survey of land — Whether interest in land only valid upon registration of title — Whether there was legitimate expectation — Sabah Land Ordinance s 12 — Sabah Land Rules r 2

Two appeals emanated from two civil actions at the High Court. In the first action ('the first suit'), the three plaintiffs sued the State Government of Sabah ('the first defendant'), the Director of Forestry Department ('the second defendant') and the third defendant. In the second suit ('the second suit'), the same first and second plaintiffs only, sued the first defendant in the first suit and the second defendant. The first, second and third plaintiffs in the first suit were natives of Sabah. The first and second plaintiffs had purchased the purported rights over several pieces of lands ('the lands') and in the same year, the first plaintiff and the second plaintiff applied for the same lands from the defendants. The first plaintiff claimed that the Land Utilisation Committee ('LUC') had approved both their applications and the Lands and Surveys Department had offered to alienate the lands to both the plaintiffs. Both the plaintiffs paid 50% of the premium of the said lands. The third plaintiff claimed that he had applied for 30 acres of the said lands and had planted oil palm on them. He claimed to have done so in exercise of his native customary rights. The second defendant discovered that the lands fell within the Madai Baturong Forest Reserve and cleared the oil palm planted on the said lands. According to the plaintiffs, the defendants had destroyed their oil palm without giving any notice or compensation to them. The plaintiffs thus prayed for declaratory reliefs that the defendants had negligently destroyed the plaintiffs' oil palm and/or in breach of natural justice and/or ultra vires art 13 of the Federal Constitution. The judicial commissioner ('the JC') held that the first and second plaintiffs had the legitimate expectation to the said lands premised on representations of the defendants but there was no such legitimate expectation available to the third plaintiff, because his application was not given any offer to alienate by the defendants. The JC found a binding agreement between the parties when the offer was made to the plaintiffs and payment of 50% was made. Upon failure to deliver the titles of the lands to the plaintiffs, and on discovering that the lands to be within the forest reserve of

Madai Baturong Forest Reserve, the defendants were in breach of support of the said agreement. The agreement was found to be frustrated pursuant to s 57(2) of the Contracts Act 1950. The JC further ordered for compensation to be paid to the plaintiffs. Hence, the present appeals.

Held, allowing the appeals with costs of RM20,000 here and below subject to allocator and setting aside the decision of the High Court:

(1) The plaintiffs raised a preliminary objection to the first ground raised by the defendants as it was not a ground stated in the memorandum of appeal, thus the defendants should not be allowed to canvass such an issue. A ground of appeal raised on a question of law should be allowed even if it was not stated in the memorandum of appeal. The defendants were merely raising a point of law which would not be premised on any new fact or evidence. An appellate court may consider a point not taken in the memorandum of appeal based on the broad working of s 69(4) of the Courts of Judicature Act 1964 and r 18(2) of the Rules of the Court of Appeal 1994, if justice so requires (see paras 20–22).

(2) Section 12 of the Sabah Land Ordinance ('the Ordinance') and r 2 of the Sabah Land Rules do not recognise mere application for land and any payment made pursuant as an undertaking that the application for land has been approved. Any land title can only be issued after the land has been properly surveyed and any use or occupation of land cannot be allowed before completion of survey unless so authorised by the collector upon issuance of a provisional lease. Under s 88 of the Ordinance, it is clearly provided that any interest in land shall be valid only upon registration of title (see para 25).

(3) Any land under forest reserve, is governed by the Forest Enactment 1968 which prohibits alienation of, and cultivation on, such land. The JC erred herein to have ruled that the plaintiffs had legitimate expectation purely on the two offer letters to alienate lands to the plaintiffs which state clearly that the offer was conditional upon the availability of unencumbered State lands upon survey. The doctrine of legitimate expectation did not apply and could not override the legal provision as clearly stipulated under the Ordinance. The JC failed to apply the relevant statutes in determining the issues before him (see paras 25–26).

(4) The plaintiffs' complaint against the defendants in this case ought to have been brought by way of judicial review. The procedure to challenge the exercise of statutory powers by public authority has been explicitly provided under O 53 of the Rules of the High Court 1980 (now O 53 of the Rules of Court 2012). As a general rule, an application for reliefs against public authority which involve the question of the proper exercise of the statutory powers of the defendants as public authority should have been proceeded under that rule. The failure of which should stand the

suit liable to be struck out. Thus, appellate intervention was clearly warranted in these appeals as the JC had fallen into error (see paras 27–28).

[Bahasa Malaysia summary

Dua rayuan telah timbul daripada dua tindakan sivil di Mahkamah Tinggi. Dalam tindakan pertama ('guaman pertama'), tiga plaintif telah menyaman Kerajaan Negeri Sabah ('defendan pertama'), Pengarah Jabatan Perhutanan ('defendan kedua') dan defendan ketiga. Dalam guaman kedua ('guaman kedua'), plaintif-plaintif pertama dan kedua yang sama sahaja, telah menyaman defendan pertama dalam guaman pertama dan defendan kedua. Plaintif-plaintif pertama, kedua dan ketiga dalam guaman pertama merupakan anak watan Sabah. Plaintif-plaintif pertama dan kedua telah membeli hak-hak yang dikatakan ke atas beberapa bidang tanah ('tanah tersebut') dan dalam tahun yang sama, plaintif pertama dan plaintif kedua telah memohon untuk tanah-tanah yang sama daripada defendan-defendan. Plaintif pertama telah mendakwa bahawa Jawatankuasa Penggunaan Tanah ('JPT') telah melulusan kedua-dua permohonan mereka dan Jabatan Tanah dan Ukur telah menawarkan untuk memberi hak milik tanah tersebut kepada kedua-dua plaintif. Kedua-dua plaintif telah membayar 50% daripada premium tanah tersebut. Plaintif ketiga mendakwa bahawa dia telah memohon untuk 30 ekar tanah tersebut dan telah menanam kelapa sawit atasnya. Dia mendakwa telah berbuat demikian untuk melaksanakan hak anak watannya. Defendan kedua mendapati bahawa tanah tersebut terjatuh dalam Hutan Simpanan Madai Baturong dan membersihkan kelapa sawit yang ditanam atas tanah tersebut. Menurut plaintif-plaintif, defendan-defendan telah memusnahkan kelapa sawit mereka tanpa memberi apa-apa notis atau pampasan kepada mereka. Plaintif-plaintif dengan itu memohon untuk relief-relief deklaratori bahawa defendan-defendan telah dengan cuai memusnahkan kelapa sawit plaintif-plaintif dan/atau melanggar keadilan asasi dan/atau ultra vires perkara 13 Perlembagaan Persekutuan. Pesuruhjaya kehakiman ('PK') telah memutuskan bahawa plaintif-plaintif pertama dan kedua mempunyai jangkaan sah terhadap tanah tersebut berdasarkan representasi-representasi defendan-defendan tetapi tidak terdapat jangkaan sah yang tersedia kepada plaintif ketiga, kerana permohonannya tidak diberikan apa-apa tawaran untuk memberi hak milik oleh defendan-defendan. PK mendapati terdapat satu perjanjian mengikat antara pihak-pihak apabila tawaran itu dibuat kepada plaintif-plaintif dan bayaran 50% telah dibuat. Setelah gagal untuk menyerah hak milik tanah tersebut kepada plaintif-plaintif, dan mendapati bahawa tanah tersebut dalam hutan simpanan Madai Baturong, defendan-defendan telah melanggar sokongan perjanjian tersebut. Perjanjian itu didapati mengecewakan menurut s 57(2) Akta Kontrak 1950. PK selanjutnya memerintahkan agar pampasan dibayar kepada plaintif-plaintif. Justeru, rayuan-rayuan ini.

Diputuskan, membenarkan rayuan-rayuan dengan kos RM20,000 di sini dan di bawah kepada alokatur dan mengetepikan keputusan Mahkamah Tinggi:

(1) Plaintif-plaintif telah menimbulkan bantahan awal terhadap alasan pertama yang ditimbulkan oleh defendan-defendan kerana ia bukan satu alasan yang dinyatakan dalam memorandum rayuan, oleh itu defendan-defendan tidak patut dibenarkan mengutarakan isu sedemikian. Satu alasan rayuan yang ditimbulkan berhubung persoalan undang-undang hendaklah dibenarkan meskipun ia tidak dinyatakan dalam memorandum rayuan. Defendan-defendan hanya menimbulkan poin undang-undang yang tidak berpremiskan apa-apa fakta atau keterangan baru. Mahkamah rayuan boleh mempertimbangkan perkara yang tidak dimasukkan kedalam memorandum rayuan berdasarkan maksud luas s 69(4) Akta Mahkamah Kehakiman 1964 dan k 18(2) Kaedah-Kaedah Mahkamah Rayuan 1994, jika keadilan menghendaki sedemikian (lihat perenggan 20–22).

(2) Seksyen 12 Ordinan Tanah Sabah ('Ordinan tersebut') dan k 2 Kaedah-Kaedah Tanah Sabah tidak mengiktiraf permohonan semata-mata untuk tanah dan apa-apa bayaran yang dibuat berikutan itu sebagai akujanji bahawa permohonan untuk tanah itu telah diluluskan. Apa-apa hak milik tanah hanya boleh dikeluarkan selepas tanah itu dikaji selidik dan apa-apa penggunaan atau pendudukan tanah itu tidak boleh dibenarkan sebelum kaji selidik selesai kecuali dengan kebenaran pengutip selepas keluaran pajakan sementara. Di bawah s 88 Ordinan tersebut, ia jelas memperuntukkan bahawa apa-apa kepentingan dalam tanah hendaklah sah hanya selepas pendaftaran hak milik (lihat perenggan 25).

(3) Apa-apa tanah di bawah hutan simpanan, adalah dikawal oleh Enakmen Hutan 1968 yang melarang pemberian hak milik, dan penanaman atas, tanah tersebut. PK telah terkhilaf kerana memutuskan bahawa plaintif-plaintif mempunyai jangkaan sah berhubung dua surat tawaran untuk memberi hak milik tanah tersebut kepada plaintif-plaintif yang menyatakan dengan jelas bahawa tawaran itu bersyarat selepas ketersediaan tanah Kerajaan Negeri yang tiada halangan untuk menggunakannya selepas kaji selidik. Doktrin jangkaan sah tidak terpakai dan tidak boleh mengatasi peruntukan sah sepertimana dinyatakan dengan jelas di bawah Ordinan. PK gagal untuk mengguna pakai statut-statut relevan dalam menentukan isu-isu di hadapannya (lihat perenggan 25–26).

(4) Aduan plaintif-plaintif terhadap defendan-defendan dalam kes ini patut dimulakan melalui semakan kehakiman. Prosedur untuk mencabar pelaksanaan kuasa statutori oleh pihak berkuasa awam telah diperuntukkan dengan jelas di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 (sekarang A 53 Kaedah-Kaedah Mahkamah 2012). Sebagai

rukun am, permohonan untuk relif-relif terhadap pihak berkuasa awam yang melibatkan persoalan penggunaan wajar kuasa statutori defendan-defendan sebagai pihak berkuasa awam sepatutnya dimulakan di bawah kaedah tersebut. Kegagalan yang mana hendaklah menjadikan guaman itu boleh dibatalkan. Oleh itu, campur tangan pihak rayuan jelas mewajarkan rayuan-rayuan tersebut kerana PK telah terkhilaf (lihat perenggan 27–28).]

Notes

For cases on alienation of land in general, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2727–2728.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)

Dataran Rentas Sdn Bhd v BMC Construction Sdn Bhd [2010] 5 MLJ 222, FC (refd)

Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy [2016] 5 MLJ 590, FC (folld)

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)

Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9, FC (refd)

Legislation referred to

Contracts Act 1950 ss 40, 57(2)
Courts of Judicature Act 1964 s 69(4)
Federal Constitution art 13
Forest Enactment 1968
Rules of Court 2012 O 14A, O 33, O 53
Rules of Court of Appeal 1994 r 18(2)
Rules of the High Court 1980 O 53
Sabah Land Ordinance (Cap 68) ss 12, 22, 88
Sabah Land Rules 1930 r 2

Appeal from: Suit Nos TWU-21–6/10 of 2012 and TWU-21–2/2 of 2013 (High Court, Tawau)

Roderic Fernandez (Mohd Faizal Izuddin bin Mohd Hanan with him) (Legal Officer, State Attorney-General's Chambers of Sabah) for the appellants.
Trevor Maringking (Maringking & Co) for the respondents.

Rohana Yusuf JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two appeals before us which emanate from two civil actions at the High Court of Sabah and Sarawak in Tawau. In the first action, Suit No TWU-21–6/10 of 2012 ('the first suit') the three plaintiffs, Clarence Chiuh ('the first plaintiff'), Lawrence Chiuh ('the second plaintiff') and Hasri bin Budia ('the third plaintiff') sued the State Government of Sabah ('the first defendant'), the Director of Forestry Department ('the second defendant') and Sofien bin Mohd Saib ('the third defendant'). In the first suit the plaintiffs sought for the following declaratory reliefs in relation to three pieces of land:

1. A declaration that the respective Plaintiffs have the right and/or legitimate expectation to be issued with title deeds for the lands which they have applied and approved and/or have respectively planted oil palms thereon;
2. A declaration that the Plaintiffs held their respective lands under native customary right and that they have permanent heritable and transferable rights to occupy the lands which they have respectively cultivated and planted oil palm thereon;
3. A declaration that the second and third defendants by their agents negligently destroyed the Plaintiffs' oil palm or in breach of natural justice and/or ultra vires Article 13 of the Federal Constitution and therefore the Defendants are liable to pay damages to the Plaintiffs respectively.

[2] In the other action, Suit No TWU-21–2/2 of 2013 ('the second suit') the same first and second plaintiffs only, sued the first defendant in the first suit (State Government of Sabah) and the Director of Lands and Surveys Department ('the second defendant'). In this suit the plaintiffs sought for the following declaratory reliefs, in relation to the same land:

1. A declaration that the said land were duly alienated to the Plaintiffs in accordance with the relevant provisions under the Land Ordinance by virtue of the said offers and the acceptance of the payment of 50% premium thereon thus by refusing to issue them an RSP to survey the said land the Defendants are in breach of the said offers;
2. A declaration that by virtue of and/or pursuant to the said offers the Plaintiffs have lawfully cultivated with legitimate expectation to be issued with title deeds by the Defendants the said land and/or the Plaintiffs are entitled to be paid damage thereon;
3. A declaration that by virtue of section 66 of the Land Ordinance the Plaintiffs have lawfully purchased the said land from the said Ladja bin Abdul Lani and others under native customary rights and which they cannot be deprived of except in accordance with Article 13 of the Federal Constitution.

[3] The two suits were obviously made in respect of the same three pieces of land. The learned judicial commissioner ('the JC') having found that there were some duplicities in both the actions because they relate to the same lands and substantially were based on the same facts, proceeded to hear the first suit, the decision of which was extended to the second suit.

[4] Both parties had agreed to invoke O 14A and O 33 of the Rules of Court 2012, to determine the liability of the defendants. The parties agreed on the facts and filed statement of agreed facts as well agreed bundle of documents. The parties also filed agreed issues to be tried.

[5] The learned JC allowed the claim of the plaintiffs in prayers 1–2 in the first suit as prayed in the statement of claim. The learned JC further ordered for compensation to be paid to the first and second plaintiffs and ordered for it to be assessed before the registrar. The third prayer was dismissed because the learned JC ruled that the third plaintiff had no locus standi to claim against the defendants since his land application had not been approved nor was he given any offer of land alienation similar to the first and the second plaintiffs. According to the learned JC the third plaintiff therefore had no cause of action against the defendants and hence his claim was dismissed. The third plaintiff did not appeal on the dismissal.

[6] The defendants in both suits filed two separate appeals. Appeal No S-01–405–10 of 2014 emanates from the decision of the second suit and both the defendants therein viz; the State Government of Sabah and the Director of Lands and Surveys Department, appealed against the whole decision of the learned JC. Appeal No S-01–404–10 of 2014 emanates from the first suit and was appealed by the three defendants therein viz; the State Government of Sabah, the Director of Forestry Department and Sofien bin Mohd Said.

[7] We heard both the appeals on 16 March 2016, and allowed both the appeals with costs of RM20,000 here and below. The reasons for our decision are as follows.

BRIEF FACTS

[8] The brief facts of the case as narrated by the learned JC revealed the following: the first, second and third plaintiffs in the first suit are natives of Sabah and were residing at Kunak. They depended on oil palms cultivation as their means of living and source of support of their livelihood. The first defendant, ('the State Government of Sabah) and the second defendant ('the Director of Forestry Department') are responsible for the administration of the forest of the state of Sabah. The second defendant is an agency of the first

defendant and is established under the Forest Enactment 1968. The third defendant in the first suit was an officer and employee of the first defendant, attached to the office of the second defendant at the District of Kunak, where the subject lands are situated.

[9] The second defendant in the second appeal, (the Director of Lands and Surveys Department) is a statutory agency of the first defendant established under the Land Ordinance (Cap 68) to deal with alienation of state land and to carry out daily administration of alienated land throughout the state.

[10] The historical background to the facts of this case are these. There were four sets of application involving the same pieces of land. The first application (PT89240204) was made in 1989 by Ladja Ali bin Abdullani. This application was recommended by the Land Utilisation Committee ('LUC') for approval to the Director of Lands and Surveys Department in 1995. On that recommendation Ladja cultivated the lands with fruit trees. The first and the second plaintiffs purchased the purported rights over the lands from Ladja as evidenced in the statutory declaration dated 27 February 1998 (at pp 48–49 of the appeal record Part C (Vol I)). In the same year the first plaintiff vide PT98240146 and the second plaintiff vide PT98240387 applied for the same lands from the defendants. The first plaintiff claimed that he was represented at a meeting on 24 July 1999 that the LUC had approved both their applications. In 2002 the Lands and Surveys Department offered to alienate the lands to both plaintiffs vide a letter at pp 98–101 and 102–105 of the appeal record Part C (Vol I). Both of the plaintiffs paid 50% of the premium for the said lands as evidenced at pp 108–109 of the appeal record Part C (Vol I).

[11] Meanwhile the third plaintiff claimed that in the year 1997 vide an application PT97240250, he applied for 30 acres of the lands from the defendants. And in the year 2000, he appointed a contractor to plant oil palm on them with ten acres of the lands planted with fruits trees. He claimed to have done so in exercise of his native customary rights.

[12] In 2010, the second defendant (the Forestry Department) whilst conducting a survey, discovered that the lands fell within the Madai Baturong Forest Reserve. In carrying out the work to rehabilitate the Madai Baturong Forest Reserve in 2011, the second defendant cleared the oil palm planted on the said lands. In 2012, the District Surveyor of Lahad Datu in a letter dated 21 September 2012 to the Director of Lands and Surveys Department (at pp 117–118 of the appeal record Part C (Vol I)) stated that the registered survey plan ('RSP') for both applications PT98240146 and PT98240387 could not be issued because the lands were now within the Forest Reserve of Madai Baturong. The Lands and Surveys Department subsequently informed both the plaintiffs Clarence and Lawrence via a letter dated 1 November 2012 (at

p 2012 of the appeal record Part C (Vol II)) that the RSP could not be issued to enable them to survey the said lands as the said lands fell within the Madai Baturong Forest Reserve.

[13] The plaintiffs claimed that the defendants had destroyed their respective oil palm without giving any notice or compensation to them. The plaintiffs prayed for declaratory reliefs that the defendants had negligently destroyed the plaintiffs' oil palm and or in breach of natural justice and or ultra vires art 13 of the Federal Constitution. Therefore, the defendants are liable to pay damages to the plaintiffs.

[14] The agreed facts as filed by parties in the statement of agreed facts are as follows:

1. A land application under PT 89240204 was made by one Ladja Ali Bin Abdullani on 1989. The said land application was recommended by the Land Utilisation Committee of Kunak at a meeting held on 28.09.1995 to be approved by the Director of Lands and Surveys Department subject to availability of the land to be determined by a land survey.

2. The said land application under PT 89240204 was subsequently withdrawn by Ladja Ali Bin Abdullani by way of Statutory Declaration dated 27.02.1998.

3. A land application under PT 97240250 was made by the Third Plaintiff on 13.08.1997. As of to date, no recommendation for approval has been made by the Land Utilisation Committee of Kunak in respect of PT 97240250. However, the Third Plaintiff had cultivated the said land by planting fruits and oil palm trees thereon which to date still remains a state land.

4. Land applications under PT 98240146 dated 03.03.1998 and PT 98240387 dated 10.08.1998 were made by the First Plaintiff and the Second Plaintiff respectively. The said land applications were recommended by the Land Utilisation Committee of Kunak at a meeting held on 27.09.1999 to be approved by the Director of Lands and Surveys Department subject to availability of the land to be determined by land surveys. The First Plaintiff and the Second Plaintiff have planted the said lands under PT 98240146 and PT 98240387 respectively, with oil palm trees thereon.

5. Letters of Offer to Alienate Land for both PT 98240146 and PT 98240387 were issued on 09.01.2002 which has been duly accepted by the First Plaintiff and the Second Plaintiff on 07.03.2002 by signing the said letter of offer and paying 50% of the land premium's amount.

6. On January 2011, the Forestry Department had carried out 'Projek Pemulihan Hutan Bagi Hutan Simpan Madai Baturong VJR 107F' through an appointed contractor ie Ecotend Sdn Bhd. The said project

includes felling of oil palm trees planted within the said Forest Reserve. Hence, the First Plaintiff, Second Plaintiff & Third Plaintiff's oil palm trees were destroyed.

7. By way of letter dated 21.09.2012, the District Surveyor of Lahad Datu informed the Director of Lands and Surveys Department that RSP for both PT 98240146 and PT 98240387 could not be issued because the subject lands are located within the Forest Reserve of Madai Baturong pursuant to Survey Plan 24125676/1–6 which was approved on 30.12.2010.

[15] Arising from the above agreed facts, the issues to be tried as agreed by parties are as follows:

1. Whether the First Plaintiff, Second Plaintiff or the Third Plaintiff have locus standi to maintain this action against the Defendants since the First Plaintiff, Second Plaintiff or the Third Plaintiff at all material time were not the registered owners of the lands under PT 98240146, PT 98240387 and PT 97240250 respectively;

2. Whether the Plaintiffs in Suit No TWU-21–2/2–2013 have legitimate expectation to be issued with title deeds for the subject lands in respect of PT 98240146 and PT 98240387 pursuant to the Letter of Offers dated 09.01.2002;

3. Whether the Defendants in Suit No TWU-21–2/2–2013 are in breach of the Letter of Offers dated 09.01.2002 in respect of PT 98240146 and PT 98240387 which have been duly accepted by the Plaintiffs;

4. Whether the First and Second Plaintiffs entitled to claim for damages in respect of the oil palms trees felled by the Defendants (Forestry Department) which have been planted by the First and Second Plaintiffs within the subject lands under PT 98240146 and PT 98240387 respectively;

5. Whether the Defendants (Forestry Department) are liable to pay damages to the Third Plaintiff in respect of the destruction of the oil palm trees planted by the Third Plaintiff within the subject land under PT 97240250;

6. In the event the answer to all or any of the above questions is in the affirmative that there be an order for damages to be assessed separately.

FINDINGS OF THE HIGH COURT

[16] On 25 August 2014, the learned JC allowed the declaratory reliefs in prayers 1–2 of the statement of claim in the first suit. In his grounds of judgment and on the first and second issues for trial, the learned JC held that the first and second plaintiffs have the legitimate expectation to the said lands premised on representations of the defendants and its agent to the first and

second plaintiffs. The learned JC also found that there was offer and acceptance between parties when the first and second plaintiffs had paid 50% of the premium in the sum of RM7,500 and for that reason it was not unreasonable for the first and second plaintiffs to have entered the lands to cultivate oil palm trees, to comply with the conditions imposed on them by the defendants. The learned JC however found no such legitimate expectation would be available to the third plaintiff, because his application was not given any offer to alienate by the defendants.

[17] On the third and fourth issues for trial, the learned JC first found a binding agreement between the parties when offer was made to the plaintiffs vide a letter of offer dated 2 September 2000 and payment of 50% made. On failure to deliver the titles of the lands to the plaintiffs, upon discovering the lands to be within the forest reserve of Madai Baturong Forest Reserve, the learned JC found the defendants to be in breach of the said agreement and cited s 40 of the Contracts Act 1950 in support of those findings. As a result, the agreement was found to be frustrated pursuant to s 57(2) of the Contracts Act 1950 by the learned JC. The learned JC further ordered for compensation to be paid to the plaintiffs and such compensation was ordered to be assessed by the registrar.

THE APPEAL

[18] Before us, learned state counsel for the defendants raised the following grounds of appeal:

(a) the learned JC erred in law and in fact when the learned JC decided on the matter based on principles of contractual law instead of the principles of the alienation process under the Land Ordinance (Sabah Cap 68) ('the Sabah Land Ordinance') and the Land Rules 1930 ('the Sabah Land Rules');

(b) the learned JC erred in law and in fact when the learned JC failed to consider that land in a Forest Reserve constituted under the Forest Enactment 1968 is not available for alienation and any cultivation on such land is prohibited under the said Enactment; and

(c) the learned JC erred in law and in fact when the learned JC failed to appreciate that the principle of legitimate expectation does not apply in the instant case.

[19] The appeal by the defendants was essentially anchored on the issue that the learned JC had erred in applying the law of contracts to the present claim instead of relying on the alienation process as specified under the Land Ordinance (Sabah) (Cap 68) and the Land Rules 1930. Learned state counsel on behalf of the defendants submitted that the offer made to the plaintiffs was

conditional on the availability of unencumbered and uncommitted state land after a survey was carried out. The doctrine of legitimate expectation cannot override the legal provisions and the learned JC had erred in applying the doctrine to allow the claim of the plaintiffs.

[20] Learned counsel for the plaintiffs raised preliminary objection to the first ground raised by the defendants. Learned counsel contended that the ground raised by the defendants that the learned JC had wrongly decided and applied contractual principles to the claim of the plaintiffs was not a ground stated in the memorandum of appeal. It was submitted by learned counsel that the defendants should not be allowed to canvas such an issue since it was not one of the grounds raised.

[21] Before we delve into the other grounds of appeal, it would be pertinent first for us to deal with this preliminary issue. We agreed and noted the absence of such a ground in the memorandum of appeal. We however take the view that, a ground of appeal raised on a question of law should be allowed even if it was not stated in the memorandum of appeal. In raising this issue the defendants were merely raising a point of law which would not be premised on any new fact or evidence. Hence, it is within the power and jurisdiction of this court to make its finding as to whether or not, had that legal argument been made before the learned JC the decision of His Lordship would have been different.

[22] We are guided by the decision of the Federal Court in *Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy* [2016] 5 MLJ 590 where the Federal Court held that an appellate court may consider a point not taken in the memorandum of appeal based on the broad wording of s 69(4) of the Courts of Judicature Act 1964 and r 18(2) of the Rules of Court of Appeal 1994, if justice so requires. This jurisdiction conferred on the appellate court must of course be exercised subject to certain limitation; the appellate court should not invent or create a cause of action or defence under the guise of doing justice (see also *Dataran Rentas Sdn Bhd v BMC Construction Sdn Bhd* [2010] 5 MLJ 222).

[23] In *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9, the Federal Court laid out the exceptions that allow an appellate court to entertain points of law raising issue of jurisdiction, and points of law even if not raised below, which would result in rectification of an erroneous order.

[24] Having said that, we agree with the submissions of the learned state counsel that there is no basis to apply the law of contract on the facts of the

present appeal. The alienation of state land is regulated by the Sabah Land Ordinance which lays out clear provisions on the process of alienation of land in the state of Sabah.

[25] It is plain and clear that s 12 of the Sabah Land Ordinance and r 2 of the Sabah Land Rules do not recognise mere application for land and any payment made pursuant thereto as an undertaking that, the application for land has been approved. Any land title can only be issued after the land has been properly surveyed (s 22) and any use or occupation of land cannot be allowed before completion of survey unless so authorised by the collector upon issuance of a provisional lease. And under s 88, it is clearly provided that any interest in land shall be valid only upon registration of title. On top and above that any land under forest reserve as in this case, is governed by the Forest Enactment 1968 which prohibits alienation of, and cultivation on, such land.

[26] The learned JC had erred to have ruled that the plaintiffs had legitimate expectation purely on the two offer letters to alienate lands to the plaintiffs which state clearly that the offer was conditional upon availability of unencumbered state lands upon survey. The doctrine of legitimate expectation does not apply and cannot override the legal provision as clearly stipulated under the Sabah Land Ordinance. The learned JC had failed to apply the relevant statutes in determining the issues before him.

[27] We hastened to add that the plaintiffs' complaint against the defendants in the case ought to have been brought by way of judicial review. The Federal Court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 had made clear that a complaint and the procedure to challenge the exercise of statutory powers by public authority has been explicitly provided under O 53 of the Rules of the High Court 1980 (now O 53 of the Rules of Court 2012). As a general rule an application for reliefs against public authority as in the instant case which involve the question of the proper exercise of the statutory powers of the defendants as public authority should have been proceeded under that rule. The failure of which should stand the suit liable to be struck out.

[28] Premised on all the above reasons, we agree with the learned state counsel that the learned JC had fallen into error which merit our appellate intervention. We are mindful that an appellate court will not intervene the findings of a trial judge unnecessarily. The exception to this is when the trial judge misapprehended the law and had applied wrong principle of law to the facts (see *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35). We found that appellate intervention is clearly warranted in these appeals. We therefore allowed both the appeals by the defendants with costs of RM20,000 here and below, subject to allocatur's fee

and we ordered for the decision of the High Court to be set aside.

Appeals allowed with costs of RM20,000 here and below subject to allocator; decision of High Court set aside.

Reported by Afiq Mohamad